United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2125

To be argued by
MICHAEL Q. CAREY

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2125

UNITED STATES OF AMERICA,
Respondent-Appellee,

—v.—

ROBERTO QUINONES, a/k/a "ISMAEL QUINONES",
Petitioner-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
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MICHAEL Q. CAREY,
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Assistant United States Attorneys, of Counsel.

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Preliminary Statement

Roberto Quinones, a/k/a "Ismael Quinones" appeals from an order entered on July 24, 1974 in the United States District Court for the Southern District of New York by the Honorable Edmund L. Palmieri, United States District Judge, denying his petition, pursuant to 28 U.S.C. § 2255, for leave to withdraw his plea of guilty entered on June 7, 1972 and to vacate the judgment of conviction entered on September 11, 1972.

Indictment 72 Cr. 385, filed April 3, 1972, charged Quinones in two counts and co-defendant Jose Calvente in one count with distributing and possessing with the intent to distribute heroin in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).*

* Calvente pleaded guilty to Count One and was sentenced by Judge Palmieri on September 11, 1972 to eight years imprisonment to be followed by a term of three years special parole.

On June 7, 1972 Quinones entered a plea of guilty to Count Two of the indictment, and on September 11, 1972, he was sentenced by Judge Palmieri to twelve years imprisonment, to be served concurrently, to the extent possible, with a New York State sentence of imprisonment and to be followed by three years special parole.

On or about February 6, 1974 Quinones wrote a letter to Judge Palmieri challenging the validity of his guilty plea. The District Court construed the letter as a petition, pursuant to 28 U.S.C. § 2255 for leave, pursuant to Rule 32(d), Fed. R. Crim. P., to withdraw his guilty plea and to vacate the judgment of conviction entered on September 11, 1972. After receiving affidavits from the Government opposing the petition, Judge Palmieri conducted a hearing on June 18, 1974 to determine the validity of Quinones' allegations. On July 24, 1974, the District Court filed a memorandum opinion denying the petition.

Quinones is currently in custody at Greenhaven Correctional Facility, Stormville, New York.

Statement of Facts

In his letter to Judge Palmieri postmarked February 6, 1974, Quinones claimed that he had been inadequately represented by his retained counsel in this case, Charles T. McKinney, Esq., that he had pled guilty on June 7, 1972 because Mr. McKinney had told him that in return for his plea of guilty the Assistant United States Attorney had "offered" a seven year sentence to run concurrently with his seven year state sentence, that he had not been totally aware of the English language and that by the time an interpreter had informed him of his sentence, Judge Palmieri had left the courtroom and he could not protest his sentence. Quinones' letter reads as follows:

"Your Honor:

I, Ismael Quinonez (sic) appeared before Your Honor on Sep. 11, 1972 to have sentence past upon me after pleading guilty to the charge of Criminal Possession of Dangerous Drugs in the 3rd Degree. At which time Your Honor imposed upon me a twelve (12) year sentence.

Pursuant to Section 4082 of Title 18, U.S. Code, Your Honor recommended that the Attorney General make arrangements to have this sentence served concurrently with the sentence that I am presently serving at Green Haven State Prison, Stormville, New York.

Your Honor further imposed, pursuant to the provisions of Title 21, Section 841, U.S. Code, that I be placed on a Special Parole for a term of three (3) years to commence upon the expiration of my confinement.

Due to the dimness of my understanding of the law, I pray Your Honor to enlighten me on the provisions of Title 21, Section 841, U.S. Code and of said Special Parole in relation to the expiration of my confinement. My papers of Judgment and Commitment (Rev. 2-68) Cr. form No. 25A do not read too clearly to me.

I further will like to bring to your attention the inadequate representation of counsel in my case. The attorney, Mr. Charles T. McKinney informed me during the course of my trail (sic) that the District Attorney had offered seven (7) years to run concurrent with the State term in return for my plead (sic) of guilty. This information was given to me by counsel outside the courtroom, but in the presence of another individual by the name of Jose M. Calvente, who was to be sentenced at that time.

Based upon this information given to me by counsel I pleaded guilty to the said charge, later to find the District Attorney not to keep his promise.

Not totally aware of the English language, I was defenseless on the procedu s of the Court. Therefore, I had all my trust in the attorney, however, he did not properly represent me and my interest. When Your Honor pronounced sentence I was not aware of the same. After sentence was past I was informed by a interpreter assigned by Court the extent of my sentenced. I tried to protest, however, it was fruitless, Your Honor had left the court room. My attorney calmed me by assuring me he would appeal the sentence. Two (2) years have elapsed since the time of my sentence and my attorney has done very little or nothing at all in my behalf. I have not heard from the attorney in six months.

In the interest of justice, I trust that you will help alleviate my dillema by rectifying the wrong of my prior attorney.

At this time I will like to point out that I am still naive of the English language and I am being assisted even now.

Your Honor, I would be highly greatful (sic) for your assistance in this matter.

Thanking you in advance, I remain,

Respectfully yours,

/S/ Ismael Quinones."

Following the District Court's decision to treat Quinones' letter as a motion under 28 U.S.C. § 2255, the two Assistant United States Attorneys who had represented the Government during the prior proceedings filed affidavits in which they denied making any statement that Quinones would be sentenced to 7 years imprisonment.

Both Mr. McKinney and Quinones testified at the hearing conducted by Judge Palmieri on June 18, 1974. McKinney categorically denied ever conveying to Quinones any offer of a 7 year sentence to run concurrently with his state sentence in return for his guilty plea. His only representation to Quinones before sentence was imposed was that the judge had the power to make the federal sentence concurrent with the state sentence if the latter were imposed first. He never told Quinones what sentence he would receive (H. 14, 17, 24, 31-32).*

Furthermore, McKinney testified that Quinones never said to him that he (Quinones) expected to receive a federal sentence of 7 years concurrent with his state sentence (H. 17, 27).

At the hearing Quinones testified that before he entered his guilty plea, McKinney had told him, in the presence of co-defendant Calvente and five other persons that he (McKinney) had spoken to the Assistant United States Attorney and that Quinones would receive a 7 year sentence concurrent with his state sentence (H. 38-43). On cross-examination Quinones, for the first time, asserted that McKinney had instructed him that, if asked, he should deny that any promises had been made to him (H. 50-51). However, the written acknowledgment of rights form signed by Quinones and McKinney on June 7, 1972 and the transcript of the proceeding when Quinones entered his guilty plea both show that Quinones understood and acknowledged that no promises had been made to induce his guilty plea.

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* Citations preceded by "H." refer to pages of the transcript of the hearing conducted on June 18, 1974.

At the conclusion of the hearing Judge Palmieri stated that he did not believe that Quinones had demonstrated that his guilty plea should be vacated:

> "I don't regard the evidence as being sufficient or persuasive. I think that this man has not sustained the allegations which he has made. I think that no promise of any kind was ever made to him by the United States Attorneys or by his attorney, Mr. McKinney. I have no reason to disbelieve their sworn statements.
>
> And it would seem, from the testimony that this man has given this afternoon, that he is unable to distinguish between what is concurrent and what is coextensive and concurrent with, and he confuses, I think, a concurrent sentence, plain and simple, with a seven year concurrent sentence. And he may have been under the mistaken impression, although I don't see how he could have been. But he was asked every conceivable question. He answered them all correctly. His lawyer supports the correctness of the proceedings in every way.
>
> The Court went to the trouble of questioning him and getting him to sign that acknowledgment of constitutional rights. And even today I think he is his own worst witness, because he contradicts himself and he has injected for the first time into this case a statement that he lied on denying the receipt of any promises and he claims that he gave that lie because he was instructed to perjure himself by his attorney.
>
> I really think it stretches the bounds of credulity to expect me to believe what he has put in his formal allegations" (H. 54-55).

In a written decision dated July 24, 1974, Judge Palmieri denied Quinones' petition, concluding that he had

failed to adduce any facts whatsoever to support his allegations, that Quinones' testimony was "vague, ambiguous and hardly credible", that McKinney did not make the alleged representation to Quinones, that McKinney was not incompetent, that Quinones understood the proceedings in English and that his plea was predicated on consciousness of guilt and voluntarily, understandingly and knowingly made with full comprehension of the consequences.

ARGUMENT

The District Court properly denied the petition.

The principal issue for determination by Judge Palmieri was one of credibility, *i.e.*, whether to accept Quinones' story that McKinney had promised him that he would receive a 7 year concurrent federal sentence or whether to believe McKinney's testimony that no such promise had been made (See H. 3). Having heard both witnesses and having carefully considered all the other evidence in the record, Judge Palmieri rejected Quinones' version, credited McKinney's testimony and properly concluded that petitioner failed to sustain his burden of establishing the invalidity of the plea. *United States* v. *Lester*, 247 F.2d 496, 500 (2d Cir. 1957). On this appeal, petitioner has utterly failed to demonstrate that Judge Palmieri's findings with respect to the credibility of the witnesses were clearly erroneous. Rule 52(a), Fed. R. Civ. P.; See *United States* v. *Lombardozzi*, 436 F.2d 878, 881 (2d Cir.), *cert. denied*, 402 U.S. 908 (1971); *United States* v. *Fernandez*, 428 F.2d 578, 580 (2d Cir. 1970); *United States* v. *Hughes*, 325 F.2d 789, 792 (2d Cir.), *cert. denied*, 377 U.S. 907 (1964).

Here, as in *United States ex rel. Zoccolillo* v. *Follette*, 306 F. Supp. 500, 501 (S.D.N.Y. 1966), *aff'd*, 419 F.2d 834 (2d Cir. 1969), "while the transcript does not convey the

demeanor aspects of the testimony, there are objective matters of record that tend strongly to support the credibility findings." First, the record amply supports Judge Palmieri's finding in his written opinion that Quinones' testimony was vague and ambiguous whereas McKinney "was able to recall the events with greater clarity. . . ." Second, although Quinones claimed that McKinney had told him that the Government had offered a 7 year concurrent federal sentence, the unchallenged affidavits of the two Assistant United States Attorneys involved in the case revealed that no such statement had been made by them to McKinney or anyone else. Third, Quinones testified on direct examination that McKinney had made the alleged promise to him in the presence of six other persons—co-defendant Jose Calvente, Quinones' brother, Calvente's attorney Jay Gold, Esq., a young girl named Mildred Casere, an interpreter and a United States Marshal (H. 39-40).* However, petitioner did not call any of these witnesses to corroborate his testimony, and there is nothing in the record to suggest that any of them were unavailable. Compare *United States ex rel. Oliver* v. *Vincent,* 498 F.2d 340, 345 n. 9 (2d Cir. 1974).

Furthermore, Quinones' allegations were contradicted by the acknowledgment of rights (GX 2) which he signed when he entered his guilty plea and his own statements before the plea was accepted (GX 1). Thus, the acknowledgment of rights states in relevant part:

> "My decision to plead guilty is freely and voluntarily made. I have not been induced to plead guilty to any count by any promises or by any statement that I would receive leniency, a lesser sentence, or

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* However, Quinones' letter to Judge Palmieri mentioned only Calvente as being present during the conversation (*supra* at p. 3).

any other consideration if I plead guilty instead of going to trial."*

During the colloquy before the District Court accepted the guilty plea, Quinones was carefully advised of the maximum penalties to which he would be subject if he pleaded guilty:

"The Court: Mr. McKinney, have you stated to your client the penalties to which he exposes himself by the plea of guilty?

Mr. McKinney: Yes.

The Court: Restate them.

Mr. McKinney: I stated he is subject to a prison sentence of fifteen years, and a fine—I forget what representation I made to him—a fine of not in excess of $25,000.

The Court: He is also subject to a special parole.

Mr. Gross: Of at least three years, if he is sentenced to prison, your Honor.

Mr. McKinney: That I did not advise him, your Honor, I am sorry.

The Court: Repeat that, please.

Mr. Gross: Yes, your Honor.

There is under the statute a special parole section of at least three years, so that if the defendant is sentenced to prison, when he comes out of prison he must do at least three years special parole.

The Court: Do you understand that?

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* McKinney testified that he was satisfied that Quinones understood the contents of the acknowledgment of rights when he signed it (H. 28). See also GX 1 (Transcript of Proceedings, June 7, 1972 at 3-4).

Mr. McKinney: I have so explained to the defendant, your Honor, and he indicates that he understands.

The Court: Mr. Quinones, do you understand what these penalties are now?

Defendant Quinones: Yes, sir.

The Court: You might get as much as fifteen years, you might get as much a fine as $25,000 on top of that, and then on top of that you have to get a period of at least three years special parole.

Do you understand that?

Defendant Quinones: Yes, sir.

The Court: Are you prepared to stand on your plea of guilty and to subject yourself to the sentence of this Court?

Defendant Quinones: Yes, sir" (GX 2, Transcript of Proceeding, June 7, 1972 at 6-7).

While, to be sure, Quinones' execution of the acknowledgment of rights form which stated that no promises had been made to him to induce his guilty plea and his response that he understood that the maximum penalty included a 15 year term of imprisonment are not of controlling weight in determining whether the alleged promise in fact had been made, *Mosher* v. *LaVallee*, 351 F. Supp. 1101, 1107 (S.D.N.Y. 1972), *aff'd*, 491 F.2d 1346 (2d Cir.), *cert. denied*, 416 U.S. 906 (1974), here, unlike the petitioners in *Mosher* v. *LaVallee*, *supra*, and *United States ex rel. Oliver* v. *Vincent*, *supra*, Quinones failed to present any independent evidence to buttress the contention that his counsel had made the alleged false promise. What is particularly significant here is that Quinones waited until cross-examination at the hearing below to assert for the first time that he had lied when he denied receiving any promises and that before the plea was entered McKinney

had instructed him to deny that any promises had been made, if asked by the judge. This final piece of blatant perjury, apparently concocted by Quinones at the conclusion of his testimony when he realized how woefully inadequate his claim really was, conclusively demonstrates the trumped up nature of his basic claim for relief.

On this appeal petitioner seems to argue that if McKinney's testimony is credited, Quinones received inadequate legal representation because no lawyer could properly permit a client, already facing a 7 year state sentence, to plead guilty to a federal charge carrying a maximum penalty of 15 years without a commitment on the sentence in advance. The argument is frivolous.

McKinney testified at the hearing that from the outset, Quinones did not wish to go to trial and wished to enter a guilty plea (H. 13). This desire was completely understandable since at no time has Quinones ever claimed that he is innocent of the charges* and since the evidence against him was overwhelming, as he himself admitted at the time the plea was entered when he told Judge Palmieri that he personally had given the heroin to the undercover agent knowing that it was unlawful to do so (Tr., June 7, 1972, at 5-6). Under these circumstances, a trial would have been an exercise in futility. Furthermore, since the indictment contained two counts against Quinones, he would have been exposed to 30 years imprisonment, if con-

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* This fact alone is enough to justify denial of petitioner's request to set aside his guilty plea, since it has long been the rule in this Circuit that a defendant who seek, to withdraw his plea should at the very least allege that he was not guilty of the charge to which he pleaded guilty. *United States* v. *Hughes*, *supra*, 325 F.2d at 792; *United States* v. *Paglia*, 190 F.2d 446, 447-48 (2d Cir. 1951); *United States* v. *Nagelberg*, 323 F.2d 936 (2d Cir. 1963), *vacated on other grounds*, 377 U.S. 266 (1964); *United States* v. *Norstrand Corp.*, 168 F.2d 481, 482 (2d Cir. 1948).

victed on both counts.* The plea reduced his exposure to 15 years, since the other count was dismissed at the time of sentence.

In his written opinion Judge Palmieri concluded that the claim of ineffective assistance of counsel did not satisfy the stringent standards which this Court has consistently applied in measuring such claims. *United States* v. *Maxey,* 498 F.2d 474, 483 (2d Cir. 1974). A defendant must demonstrate that counsel's overall representation was "'of such a kind as to shock the conscience of the Court and make the proceedings a farce and a mockery of justice.'" *United States ex rel. Marcelin* v. *Mancusi,* 462 F.2d 36, 42 (2d Cir. 1972), *cert. denied,* 410 U.S. 917 (1973), quoting *United States* v. *Wight,* 176 F.2d 376, 379 (2d Cir. 1949), *cert. denied,* 338 U.S. 950 (1950); *United States ex rel. Testamark* v. *Vincent,* 496 F.2d 641, 643 (2d Cir. 1974); *United States ex rel. Walker* v. *Henderson,* 492 F.2d 1311, 1312 (2d Cir. 1974); *United States* v. *Sanchez,* 483 F.2d 1052 (2d Cir. 1973). Petitioner has simply not made such a showing. The commitment on the length of sentence which Quinones says McKinney should have obtained in advance of the plea was simply unobtainable under well established practice in the Southern District of New York.

Relying on the District Court's observation that Quinones might have confused the idea of "a concurrent sentence, plain and simple, with a seven year concurrent sentence" (H. 54-55), petitioner argues that such a mistaken impression requires that the plea be vacated. The District Court considered this argument and properly rejected it. Under the well-established law in this Circuit, a defendant's mistaken subjective impressions that he

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* A sentence of more than 15 years was not a remote possibility in light of petitioner's "rather extensive record of prior conflicts with the law" which included multiple drug convictions (Transcript of Proceeding, September 11, 1972, 3-4).

would receive a lesser sentence than that ultimately imposed, even though induced by discussions with his lawyer, are insufficient grounds to set aside a guilty plea in the absence of substantial objective proof that they were reasonably justified. *Mosher* v. *LaVallee, supra,* 491 F.2d at 1347-48; *United States ex rel. Curtis* v. *Zelker,* 466 F.2d 1092, 1098 (2d Cir. 1972); *United States ex rel. LaFay* v. *Fritz,* 455 F.2d 297, 302-303 (2d Cir.), *cert. denied,* 407 U.S. 923 (1972); *United States ex rel. Scott* v. *Mancusi,* 429 F.2d 104, 108 (2d Cir. 1970), *cert. denied,* 402 U.S. 909 (1971); *United States ex rel. Callahan* v. *Follette,* 418 F.2d 903, 904 (2d Cir. 1969), *cert. denied,* 400 U.S. 840 (1970); *United States ex rel. Bullock* v. *Warden,* 408 F.2d 1326, 1330 (2d Cir. 1969), *cert. denied,* 396 U.S. 1043 (1970); *United States* v. *Horton,* 334 F.2d 153, 155 (2d Cir. 1964). No such "objective proof" was presented in this case.

CONCLUSION

The order of the District Court denying the petition should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

MICHAEL Q. CAREY,
LAWRENCE S. FELD,
Assistant United States Attorneys, of Counsel.

Form

★ U. S. Government Printing Office 1974— 614—209—439

280 A - Affidavit of Service by Mail

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

MICHAEL Q. CAREY being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 13TH day of DECEMBER he served a copy of the within BRIEF FOR THE U.S. of A. by placing the same in a properly postpaid franked envelope addressed:

ROBERT GLOSSNER, ESQ.
250 BROADWAY
NEW YORK, NEW YORK 10007

And deponent further says that he sealed the said envelope and placed the same in the mail BOX drop for mailing OUTSIDE the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Michael Q. Carey

Sworn to before me this
13TH day of DECEMBER, 1974

Jeanette Ann Grayeb

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1975